No. 90-629

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

DILLARD E. KELLEY, SR.
Petitioner,

VS.

STATE OF WISCONSIN,
Respondent

On Petition for a Writ of Certiorari
to the Wisconsin Court of Appeals,
District One

PETITION FOR A WRIT OF CERTIORARI

ALVIN M. BINDER
BINDER, MILNER & MILNER
511 EAST PEARL STREET
POST OFFICE BOX 25
JACKSON, MISSISSIPPI 39205
(601) 948-8800

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

Whether the Prosecutor created reversible error in his opening statement by commenting on irrelevant, uncharged other crimes evidence and whether the Lower Court abused its discretion by condoning the usage of such other crimes evidence.

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NO. _____

IN THE

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DILLARD E. KELLEY, SR.
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VS.

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RESPONDENT

On Petition for a Writ of Certiorari
to the Wisconsin Court of Appeals District One

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

The Petitioner, Dillard E. Kelley, Sr., respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Wisconsin Court of Appeals, District One, handed down by the Wisconsin Court of Appeals, District One, on the 16th day of August, 1990. The Opinion and Judgment of the Wisconsin Court of Appeals, District One is appended, bound in the Appendix and marked as Exhibit "A".

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Prosecutor created reversible error in his opening statement by commenting on irrelevant, uncharged other crimes evidence and whether the Lower Court abused its discretion by condoning the usage of such other crimes evidence.

REFERENCE TO OPINIONS

The Opinion and Judgment of the Wisconsin Court of Appeals, District One, from which this appeal is taken is bound and marked in the Appendix as Exhibit "A".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Judgment of the Wisconsin Court of Appeals, District One, entered on August 16, 1990. Petitioner believes that this Court has jurisdiction to review said Judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions which are relevant to the decision of this case are the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or

> naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 904.01 of the Wisconsin Statutes Annotated states in pertinent part the following:

> . . . for evidence to be relevant, it must have a tendency to make the existence of a fact, that is of consequence to the determination of the action, more probable or less probable than it would be without the evidence.

Section 904.03 of the Wisconsin Statutes Annotated states in pertinent part the following:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

Petitioner, Dillard E. Kelley, Sr. was charged in a criminal complaint dated March 21, 1988, with seven counts of arson and seven counts of second degree murder. The murder charges were in connection with seven deaths caused by one of the fires alleged in one of the arson counts. (R. 2). Petitioner's trial began on March 13, 1989 in the Circuit Court for Milwaukee County, Wisconsin, (R. 35), pursuant to a 14-count information.(R. 6.)

Having impanelled a jury, the State proceeded to make an opening statement. The Prosecuting Attorney injected prejudicial drug references to irrelevant drug activity in the opening statement although Petitioner had not been charged with any drug offenses. The comments recounted a continuing association between Petitioner and two others, who dealt in cash amounts up to $50,000.00 and who were continuously selling huge amounts of drugs while earning large amounts of cash.

Counsel for Petitioner timely objected to the drug references, the jury was recessed, and the parties were heard by the Lower Court as to the propriety of and admissibility vel non of the uncharged drug misconduct. (R. 26-28). The

State therein conceded its intent was to infer that Petitioner was involved in the drug arena. The State then revealed to the Lower Court Judge its theory that Petitioner's motive for the arson was to cheat his suppliers in Miami out of drugs and money by having them informed that the drugs had been destroyed by the fire which had consumed the building at issue in one of the arson counts. The Prosecutor had not previously noticed Petitioner of his intent to use the other crimes evidence nor had he sought a ruling from the Lower Court Judge as to its admissiblity or propriety. No proffer concerning this evidence had been made.

The Lower Court accepted this evidence as tending to establish motive and intent, ruling the same was admissible (R. 37-38). Petitioner, feeling aggrieved by the Lower Court's ruling, and having observed the prejudicial impact the drug references had made on the jury, waived the jury and rested on this legal point without challenging the State's evidence or presenting one witness on his behalf. (R. 48-50).

The Lower Court found Petitioner guilty on each of the fourteen counts and sentenced him to 229 years incarceration. (R. 24;25).

ARGUMENT FOR GRANTING THE WRIT

a. The decision rendered by the Wisconsin Court of Appeals. District One, affirming the Lower Court's admission of other crimes evidence injected during the State's opening statement is in direct conflict with the mandates of the due process clause of the Fifth and Fourteenth Amendments. The parameters of the opening statements concerning a prosecutor's usage of uncharged, irrelevant other crimes evidence has not been the subject of this Court's opinions since the decision of ***Berger vs. United States of America***, 295 U.S. 78, 79 L.ed 1314 (1934). The guarantee of a fair

trial in this context is a vital decision needing to be addressed in order to elucidate the propriety of injecting uncharged misconduct during the opening statement.

ARGUMENT

I.

WHETHER THE PROSECUTOR CREATED REVERSIBLE ERROR IN HIS OPENING STATEMENT BY COMMENTING ON IRRELEVANT, UNCHARGED OTHER CRIMES EVIDENCE AND WHETHER THE LOWER COURT ABUSED ITS DISCRETION BY CONDONING THE USAGE OF SUCH OTHER CRIMES EVIDENCE.

Dillard Kelley, Sr., Petitioner herein, was found guilty in the Circuit Court of Milwaukee County, Wisconsin on charges of second degree murder and arson. It is the position of the Petitioner that the State violated his due process rights by injecting into the opening statement prejudicial references to irrelevant drug activity and the Lower Court erred in allowing the same. The comment concerning other crimes evidence, with which Petitioner had not been charged in State Court, denied Petitioner's right to a fair trial.

The State's referral to drug activities centered around a charge of arson of a building, pursuant to WSA sec. 943.02. The State's opening statement contained the following highly prejudicial and improper disclosures:

> "And you'll hear testimony that Lonnie Lathon . . . that his job was working for the Defendant and to come to Milwaukee and pick up large quantities of money, boxes,

> and they would pick those boxes up from Terry Edwards and that these were large amounts of cash, sometimes $10,000.00, sometimes $20,000.00, sometimes $50,000.00 in cash, five's, ten's, twenty's, fifty's, hundred's, small denominations. And then after the fire, the Defendant asked Lonnie Lathon to call his suppliers in Miami. And the Defendant asked Lonnie Lathon to tell them that the drugs and the money had in fact burned up in this fire, . . ." (R. 23-24).

Counsel for Petitioner objected to the drug references stating that the evidence was irrelevant, that the prejudice outweighed any probative value and that its admission would deny Petitioner a fair trial under the Wisconsin and United States Constitutions (R. 27-28, 35-37). The jury was recessed, and the parties were heard by the Lower Court as to the admissibility vel non of the uncharged drug misconduct. (R. 26-38). The State conceded its intent was to infer that Petitioner was involved in the drug arena. (R. 29). The State then revealed to the Trial Judge its theory that Petitioner's motive for the arson was to cheat his suppliers in Miami out of drugs and money by informing them that the drugs had been destroyed by the fire which had consumed the building in question. The Lower Court accepted this evidence as proof of motive and intent, ruling the same was admissible. (R. 37-38). However, the evidence was not relevant to the issues of the arson case.

WSA sec. 904.01 states that in order "for evidence to be relevant, it must have a tendency to make the existence of a fact, that is of consequence to the determination of the action, more probable or less probable than it would be without the evidence." See *State vs. Alsteen*, 108 Wis.2d 723, 324 N.W.2d 426 (1982). The Lower Court must first

determine the logical relevance of the evidence in accordance with the foregoing rule. This requisite finding of relevance is required so that factors which are irrelevant will not be injected into the fact finders' minds clouding the proper issues of the case. See WSA sec. 904.02.

Petitioner respectfully submits that references to "large boxes of money", "suppliers in Miami" and other drug dealing innuendoes should have been excluded by the Lower Court. The plain review of the statements recount that Lathon's ongoing job was to pick up boxes full of money from Terry Edwards, which money was obviously derived from the illegal sale of drugs. Hence, the State's theory of logical relevance to establish motive is tenable, at best. The mention that Petitioner was selling drugs and compiling huge boxes of money cannot be considered related to any of these charges. The State's true intent was to emphasize to the jury Petitioner's bad character as a drug dealer rather than using such evidence to prove an essential element of one of the indicated offenses. The drug references would and did accomplish the State's desire to spark the inherent prejudice that lay persons harbor in reference to narcotic's offenses. One had only to watch the jurors' eyes as the prejudicial remarks were being made to realize the insurmountable damage being done to Petitioner's right to a fair trial.

The Lower Court issued a ruling setting forth that the drug references were necessary for the State to prove motive and intent. However, the State's argument that motive was being established by the drug comments is obliterated by a reading of the actual statements made. (R. 23-24). Clearly, the statements revealed that the State was speaking of *continuous* drug dealings between Lonnie Lathon, Terry Edwards and Petitioner, rather than an isolated instance where a specified cache of drugs was destroyed. Lathon's job was characterized as being the money courier

for Petitioner. The comments revealed that Lathon would continuously pick up money derived from drug sales on many occasions rather than restricting the evidence to a time relevant to a charge in the indictment. The reference to Lathon's picking up different amounts of cash. clearly signalled to the jury that Petitioner was involved in some continuing criminal enterprise. The State attempted to have the evidence admitted under the pretext that it supplied a motive for the arson. The reality is that the State portrayed Petitioner as a person of disreputable character, a drug dealer. which was in no way relevant to any issue in the case.

Petitioner respectfully requests this Court to review ***Berger vs. United States of America***, 295 U.S. 78, 79 L.ed. 1314 (1934). This Honorable Court addressed the duty of prosecuting attorneys and stated the following:

> "It is as much the duty of a prosecuting attorney to refrain from improper methods calculated to bring about a wrongful conviction as it is to use every legitimate means to bring about a just one." 71 L.ed 1321.

This landmark decision has been repeatedly cited by State and Federal Courts throughout this country. The duty imposed on the prosecuting authority has not since been altered. The same danger of an unreliable verdict in ***Berger***, supra was presented in the case at bar. The prosecutor breached his duty by using calculated illegitimate methods to prejudice the jury against Petitioner.

Petitioner's grievance rests initially with the improper conduct exhibited by the prosecutor during the opening statement in this cause. Petitioner would cite ***Leonard vs. United States of America***, 277 F.2d 834 (9th Cir. 1960) wherein Appellant's conviction for transporting a forged

instrument in interstate commerce was reversed. The prosecutor in ***Leonard***, supra recounted to the jury during the opening statement allegations of other crimes uncharged in the indictment to the extreme prejudice of that Appellant. The 9th Circuit outlined the purpose and parameters of the opening statement as follows:

> "An opening statement should be limited to a statement of facts which the government intends or in good faith expects to prove. It should not be argumentative in character, nor should it be designed to destroy the character of the Defendant before the introduction of any evidence on the crime charged in the indictment." Id. at 841.

The instant case presents this Court with an analogous circumstance. The prosecutor exceeded the bounds of constitutional propriety by relating to the jury matters which were wholly unrelated to the case being tried. The obvious intent was to malign the character of Petitioner, prior to the presentation of the State's first witness.

The Lower Court, upon objection, issued a ruling from the bench sanctioning the State's usage of the drug references. The Lower Court ruled as follows:

> "The Court is convinced that the State will refer to any drug activities with a minimum of evidence. It will only be done to show other crimes and to show motive and intent, and I am sure that the State would limit it to that.
>
> "The defense, of course, is free to renew an objection anytime they deem that it is proper

> and that the State has gone overboard, perhaps, in showing undue reference to drug activity outside of the necessary proof for the crimes that are before this Court in question.
>
> It is quite clear that the Defendant has not been charged as a drug czar. Certainly the jury has never heard that so far. If evidence does come up regarding the Defendant's activities in drugs and it is connected to the crime in question insofar as it explains his actions, his intent and his motive, certainly under the *Witte* (sic) type of evidence, it would be allowed not to prove that he committed the crimes to-wit the drug activity, but as far as the crime that is before the Court, namely one of the fourteen offenses. So the Motion, Mr. Binder, is respectfully denied at this time, sir." (R. 37-38).

This oral opinion of the Lower Court not only did not go through any exacting analysis of the probative and prejudicial impact, but the Lower Court also made the ruling without the benefit of any proffer by the State. Petitioner would cite ***United States of America vs. Bailey***, 505 F.2d 417 (D.C. Cir. 1974), wherein the State recounted that Defendant's other crimes during its opening statement. The Lower Court was faulted for ruling on the admissibility of other crimes evidence without a prior proffer from the State as to the extent and relevancy of the other crimes. The D. C. Circuit stated as follows:

> "First, the Government should not have mentioned Appellant's prior offenses in its opening statement. Such mention irretrievably puts before a jury the fact that a defendant

> has been involved in prior criminal activity. If later Government efforts to introduce evidence of prior offenses prove unavailing, the jury is still left aware of these offenses and even with a cautionary instruction, the chances of prejudice are still significant . . . Secondly, the Trial Judge should not have even made a preliminary ruling on the admissibility of the other offenses evidence in the Government's case-in-chief without requiring a proffer of that evidence out of the hearing of the jury. Such a proffer serves three purposes. First, as with the banning of the mention of other offenses in opening statements, it shields the jury from potentially inadmissible prejudicial evidence. Secondly, it gives the Trial Judge a basis on which to balance the probative value against the prejudicial effect of the evidence. Finally, it allows the Trial Judge to probe as to whether it might be more desirable to defer admitting the evidence until the Governments rebuttal." Id. at 420

The record in this case reveals that the State did not seek a prior ruling from the Lower Court before exclaiming Petitioner's other crimes during its opening statement. Moreover, no proffer was made by the State prior to the Lower Court's uninformed ruling that the evidence was admissible.

Petitioner verily believes that his due process rights, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, have been abridged by the characater assassination presented by the prosecutor during the opening statement. Recently, in ***United States vs. Brockington***, 849 F.2d 872 (4th Cir. 1988), the 4th Circuit outlined

that the opening statement should be an objective summary of the evidence reasonably expected to be produced and should not be used as an opportunity to poison the jury's mind against the Defendant or to recite items of highly questionable evidence. Id. at 875. Another case of note is ***United States of America vs. Johnson***, 767 F.2d 1262 (8th Cir. 1985), wherein Defendant had been indicted for conspiring to transport stolen property in interstate commerce. During the opening statement, the State characterized the Defendant as an auto thief. The 8th Circuit held that although the U.S. Attorney may prosecute with vigor and earnestness, he is not at liberty to strike foul blows. The Court went on to cite ***Berger***, supra to the effect that the State's duty is to refrain from improper methods calculated to produce wrongful convictions. Id. at 1274.

Johnson, supra also speaks to the unique prejudice which results when such unconstitutional statements are presented during the opening argument. The Court expressed that remarks made during the opening statement are more egregious than if made during the closing. The Court went on to presume that the opening statement, because it did not take place in the same charged atmosphere as the closing, was more carefully planned. Moreover, comments made during the opening statement may signal and expose a prosecutor's true intent because it is delivered in a less emotional atmosphere and the comments made are considered to have been well thought out and planned.

Petitioner was indicted on the crimes of arson and murder. The indictment contains no allegation or reference concerning drugs. Petitioner's first notice that he was also being tried as a drug czar came during the opening statement. Petitioner found himself with the unenviable and unconstitutional task of having to defend himself against murder, arson and drugs.

Petitioner submits the Lower Court erred in ruling the other crimes evidence to be relevant. Furthermore, even if relevant, the evidence should have been excluded since the probativeness was substantially outweighed by the prejudicial impact. See WSA sec. 904.03, ***Vanlve v. State***, 96 Wis.2d 81, 291 N.W.2d 467 (1980).

Generally, evidence is prejudicial if it will tempt the fact finder to decide a case on an improper basis. The dictum in ***United States vs. Bass***, 794 F.2d 1305, 1313 (8th Cir. 1986) has characterized the line between the permissible uncharged misconduct evidence and improper bad character evidence as a thin line. Uncharged misconduct evidence is particularly prejudicial because it invites the jury to resolve a case on the alleged bad character of the Defendant rather than on the merits of the crime charged. The fear that the jury will over estimate the probative value of the evidence by forcing them to focus on a Defendant's subjective character raises the specter that they may be subconsciously influenced to find guilt for improper reasons. The further danger is the jury will attach too much weight to the Defendant's subjective character as a predictor of behavior on the occasion in question. See E. Imwinkelried, *Uncharged Misconduct Evidence*, sec. 2.18 (1984).

Petitioner would submit that the State's characterization of him as a drug czar who deals in huge sums of money and drugs was so prejudicial as to be insurmountable. The harm of drug use to the citizens of this country has been widely publicized by our Congress and the President of the United States. When one is seen as connected with drugs in today's society, the stigma and damage to one's character is overwhelming in light of this publicity. The drug problem is a problem of national importance. The idea of drugs and the persons who sell and use them, is repulsive to jurors and leads them to label a Defendant as antisocial.

United States vs. Green, 648 F.2d 587 (9th Cir. 1980) supports Petitioner's proposition that inherent prejudice attaches to narcotic's offenses. The prevalence and harmful effects of drugs has become the predominant concern echoed throughout every neighborhood and community in this country. One need only pick up a newspaper or turn on the television to become aware of this nation's united stand against drugs. This country has literally declared war on drugs. The public's demand for more vigorous prosecutions has led our legislators to promulgate stiffer penalties. The incidents of drug related crimes has certainly increased without any realistic hope of decline, incurring the public's outrage.

The jurors in Petitioner's case, like all citizens, had had continuous exposure to unfavorable publicity pertaining to the drug plight. The jurors' wrath was an inevitable consequence as the State announced Petitioner's involvement with Lonnie Lathon and so-called Miami drug suppliers. It was perceived from the moment Petitioner's alleged bad character was revealed to the jury that the prejudice was unable to be undone. No curative instruction could have removed the taint. Petitioner's guilt had already been decided before one witness even took the stand.

The pivotal issue in the trial was whether or not Petitioner committed the crimes charged in the indictment beyond a reasonable doubt. The more the fact finder concentrates on the uncharged misconduct, the greater the risk that they will lose sight of the central issue. Having been aggrieved by the Lower Court's decision to condone the prosecutorial actions and approve the admission of other crimes evidence, Petitioner was compelled by circumstance to waive the jury after the opening statement. This waiver; however, was an inevitable consequence based on the improper actions of the District Attorney and the abuse of discretion of the Lower Court Judge.

Petitioner feels sure that this Court, upon independently reviewing the statements, will find that the references to continuing uncharged drug activities, bore no relevance to the case, and tainted the jury to the detriment of petitioner. The taint was so evident that Petitioner felt compelled to waive the jury at that point and rest on the merits of this legal issue. (R. 48,50). The damage to Petitioner's character was beyond cure. Petitioner respectfully requests this Court to so find and reverse his convictions.

CONCLUSION

Petitioner respectfully submits that the State's misconduct in injecting uncharged, irrelevant other crimes evidence during the opening statement constitutes reversible error. The State made no proffer prior to seeking a ruling from the Lower Court, which procedure has been condemned in recent federal cases. Petitioner submits that his Due Process Rights have been abridged by the calculated misconduct of the State entitling him to a reversal of his conviction.

Further, Petitioner submits that the Lower Court erred in finding the other crimes evidence to be admissible and in condoning the State's conduct without the benefit of a proffer by the State as to the extent and relevancy of the other crimes evidence. Moreover, the Lower Court erred in finding the probative value substantially outweighed the prejudicial impact, causing Petitioner's Due Process Rights to be violated.

For all the reasons cited herein and upon a review of the record and the Appendix submitted herewith, Petitioner verily believes that this Petition for Writ Certiorari should be granted, and the Judgment of the Trial Court and the Wisconsin Court of Appeals, which affirmed the conviction, should be set aside and the Judgment of conviction reversed.

Respectfully submitted,

DILLARD E. KELLEY, SR.

BY: Alvin M. Binder per cc
ALVIN M. BINDER

ALVIN M. BINDER
BINDER, MILNER & MILNER
511 EAST PEARL STREET
POST OFFICE BOX 25
JACKSON, MISSISSIPPI 39205
(601) 948-8800

CERTIFICATE OF SERVICE

I, Alvin M. Binder, attorney of record for the Petitioner, Dillard E. Kelley, Sr., do hereby certify that I have this day forwarded by the United States mail, postage prepaid, a true and correct copy of the above and foregoing Petitioner's Petition for Writ of Certiorari to Honorable Donald J. Hanaway, Attorney General, Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857.

This the 13th day of October, 1990.

Alvin M. Binder per ca

ALVIN M. BINDER

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DILLARD E. KELLEY, SR.
Petitioner,

VS.

STATE OF WISCONSIN,
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On Petition for a Writ of Certiorari
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APPENDIX

By Petitioner, Dillard E. Kelley, Sr.

ALVIN M. BINDER
BINDER, MILNER & MILNER
511 EAST PEARL STREET
POST OFFICE BOX 25
JACKSON, MISSISSIPPI 39205
(601) 948-8800

ATTORNEY FOR PETITIONER

APPENDIX

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EXHIBIT "A"

OPINION AND JUDGMENT OF THE WISCONSIN COURT OF APPEALS, DISTRICT ONE

Office of the Clerk

COURT OF APPEALS

OF WISCONSIN

DISTRICT I

Marilyn L. Graves
Clerk

Madison, August 16, 1990

To:
Hon. John E. McCormick
Safety Bldg., Room 578
(L.C. #F-880764)

Thomas P. Schneider
Dep. District Attorney
Safety Bldg., Room 411

Ann T. Bowe
The Tower House
3011 W. State Street
Milwaukee, WI 53208

Barry M. Levenson
Asst. Attorney General
P.O. Box 7857
Madison, WI 53707

You are hereby notified that the Court entered the following opinion and order:

90-0014-CR State v. Dillard E. Kelley, Sr.

Before Moser, P.J., Sullivan and Fine, JJ.

Dillard E. Kelley appeals from a judgment of conviction, following a bench trial, of seven counts of second-degree murder, four counts of arson to a building, two counts of arson of property other than a building, and one count of arson with intent to defraud, party to a crime, contrary to secs. 940.02(2), 943.02(1)(a), 943.03, 943.04, and 939.05, Stats. (1985-86). He challenges the admissibility of his

drug-related activities at trial and the length of his sentence. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* Rule 809.21, Stats.

Kelley claims that the prosecutor, during his opening statement to the jury, improperly indicated that Kelley was involved in drugs. The prosecutor made the following statement:

> You'll hear testimony that [Kelley] hired an individual by the name of Ed Clayton, sometimes referred to as Big Ed, sometimes Ed the Torch, sometimes as Fireman Ed, sometimes just as Ed. But you'll hear testimony about Mr. Clayton.
>
> And you'll hear testimony that [Kelley] hired him as the torch to burn this premises.
>
> . . . .
>
> And you'll hear testimony that Lonnie Lathon . . . that his job was working for [Kelley] and to come to Milwaukee and pick up large quantities of money, boxes, and they would pick those boxes up from Terry Edwards and that these were large amounts of cash, sometimes 10,000, sometimes 20,000, sometimes $50,000 in cash, fives, tens, twentys, fiftys, hundreds, small denominations.
>
> And then after the fire, [Kelley] asked Lonnie Lathon to call his suppliers in Miami. And [Kelley] asked Lonnie Lathon to tell

> them that the drugs and the money had in fact burned up in this fire . . . .

During an in-chambers hearing, Kelley moved for a mistrial, arguing that since Kelley had not been charged with any drug offenses, and that any drug references were unconnected and irrelevant to the second-degree murder and arson charges. The prosecutor argued that the drug information was necessary to prove Kelley's intent on the arson and murder charges, and that it established his motive to cheat his suppliers in Miami out of the drugs and money by informing the suppliers that the drugs had been destroyed by the fire that had consumed the building.

The trial court ruled that the evidence was admissible as proof of motive and intent. Kelley subsequently waived his right to a jury trial, and trial was had to the court. The trial court found Kelley guilty on the 14 counts, and sentenced him to 229 years imprisonment to be served consecutive to a federal 30 year sentence. The trial court also imposed fines totalling $30,000.00.

The trial court's written decision sets forth its reasoning for the admission of the drug evidence:

> In the counts charged, the state is required to provide intent and knowledge. Proof of "motive": is relevant and admissible to show intent. In all but one of the counts the defendant is charged with being party to the crime, in that he is alleged to have hired another to commit the arsons and it is therefore critical and essential for the State to prove "preparation" and "plan." Finally, the "identity" of the defendant as being involved in these offenses is critical. For

example, as evidenced by the stipulations entered into by the defendant, the defendant did not contest the fact that the fires occurred, and he did not contest the fact that they were arsons. Nor does he contest the fact that seven human beings were killed in one of the fires. Rather, he challenged identity and denied his own involvement.

. . . .

Evidence of the defendant's involvement with drugs was referred to in the prosecutor's opening statement only insofar as it was directly related to the offenses charged and solely for the purpose of showing motive, intent, preparation, plan, knowledge and identity. This evidence was not offered to prove the character of the defendant nor was any such claim made before the jury. In fact, the jury instruction on *Whitty* (34 Wis.2d 278) evidence under this section was specifically submitted to the court and would have certainly have been submitted to the jury in this case. In fact, the state specifically asked the court only to consider this evidence for the limited purpose of showing motive, intent, preparation, plan, knowledge, and identity and for no other purpose, which the court so considered.

As outlined in *State v. Pharr*, 115 Wis. 2d 334, 340, N.W. N.W. [*sic*] 498 (1983), the court must make two determinations as to other crimes or acts evidence. First, the court must determine that the evidence fits within

one of the exceptions cited in Wis. Stat. 904.04(2) as specifically outlined above. The court in fact ruled that the evidence was submitted for the sole purpose of showing motive, intent, preparation, plan, knowledge and identity and for no other purpose.

Second, under *State v. Pharr* the trial court must determine whether the probative value of the evidence substantially outweighs the danger of unfair prejudice to the defendant. In the case at hand reference to drugs as it relates to the specific crimes charged appears in the criminal complaint, was testified to at the preliminary hearing, and is part and parcel of the specific charges. For example, one of the two reasons why the defendant hired Ed Clayton to burn the premises at 2552 North 18th Street was because Roger Weatherby (one of the victims) had refused to pay Kelly a drug debt. The reason the defendant hired Clayton to burn the residence at 3063 North 21st Street was because Orr was operating a rival drug house within a block to two blocks of the drug house run by Terry Kelley for the defendant. As a result, the defendant decided to burn out his opposition and when the fire occurred, the report back to the defendant was that the "store was closed," meaning the rival drug operation had been shut down. In addition, the evidence establishes that Terry Kelley was selling drugs for the defendant from her residence at 19th and Chambers and was shipping large amounts of cash to the defendant. The evidence establishes that the reason

why the defendant hired someone to burn the premises was so that he could report to his suppliers in Miami that $160,000 in cash [and?] several kilos of cocaine had burned in the fire.

The evidence establishes the preparation and plan of the defendant and his involvement with Ed Clayton, the intent and knowledgd of the defendant of the fires, the motive of the defendant to commit the crimes, and the identity of the defendant as the person who hired Ed Clayton and/or others to set the fires. Without being able to establish how, why, and by whom these fires were set, the state would be unable to meet its burden of proof. Therefore, the court found and the court continues to so find that the probative value of this evidence substantially outweighs the danger of unfair prejudice to the defendant. (See *Cheney v. State*, 44 Wis. 2d 454)

Finally, no suggestion was made to the jury that "someone who broke the law once will break it again." No reference was made to any prior criminal convictions nor was any such evidence admitted by the court to show the character of the defendant.

Therefore, the prosecutor properly limited the opening statement to evidence which was to be properly presented to the jury, and the court ruled that the evidence was offered for a proper purpose and its probative value outweighed the danger of unfair prejudice, and only for the lawful purpose of showing

> motive, intent, preparation, plan, knowledge and identity and for no other purpose.

On appeal, Kelley argues that "the evidence was not relevant to the issues of the arson case and the Lower Court failed to first balance the probative and prejudicial impact on the record."

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show" a person's criminal propensity. Rule 904.04(2), Stats. "Other acts" evidence is admissible under 904.04(2), however, "when offered for purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Ibid.*

Admission of "other acts" evidence is subject to a two-part test. First, the evidence sought to be admitted must be relevant to one of 904.04(2)'s exceptions. *State v. Mink*, 146 Wis.2d 1, 13, 429 N.W.2d 99, 103 (Ct. App. 1988). Second, "the trial court must determine whether any prejudice resulting from the admission of such evidence substantially outweighs its probative value." *Ibid.; see* Rule 904.03, Stats.; *see also State v. Pharr*, 115 Wis.2d 334, 343-344, 340 N.W.2d 498, 502 (1983). Kelley, however, has failed to meet this burden.

Our review of the trial court's determination is governed by the abuse of discretion standard. *See Mink*, 146 Wis.2d at 13, 429 N.W.2d at 104. We will uphold a trial court's determination when the trial court exercises its discretion "according to accepted legal standards and in accordance with the facts of record," and sets forth its reasoning on the record. *Ibid.; Pharr*, 115 Wis.2d at 342, 340 N.W.2d at 501. The trial court complied with these standards and did not abuse its discretion.

Kelley's status as a drug dealer gave motive for the arsons, and was thus probative with respect to the issues of identity. Accordingly, the evidence fell within Rule 904.04(2)'s exceptions.

We likewise reject Kelley's claim that the trial court failed to balance the probative value of the "other acts" evidence against its prejudicial effect. Review of the transcript from the in-camera hearing, as well as the trial court's written decision, negates his arguments. There was no abuse of discretion.

Kelley's second argument is that the trial court abused its discretion in sentencing Kelly, 54 years old at the time of the sentencing, to a 229 year sentence, consecutive to a 30 year federal sentence. He claims that the sentence forecloses any possibility of parole because "the minimum term of years Kelley must serve prior to being considered for parole greatly exceeds his life expectancy."

Kelley failed to move the trial court for modification of his sentence. In *State v. Meyer*, 150 Wis.2d 603, 442 N.W.2d 483 (Ct. App. 1989), we held that in the absence of compelling circumstances, a motion for modification of a defendant's sentence is a "necessary condition precedent" to appellate review. We therefore deem the issue to be waived, and Kelley has not demonstrated any "compelling circumstances" that would warrant our exercise of discretion to consider the issue. *See id.*, 150 Wis.2d at 605-606, 442 N.W.2d at 484-485. By permitting consecutive sentences, sec. 973.15(2), Stats., the Wisconsin legislature has recognized that the total length of all sentences imposed might effectively result in a "life" term. Under the circumstances presented by this case, it cannot be said that such a result is shocking to the judicial conscience. *See Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457, 461 (1975).

Because we conclude that the trial court appropriately exercised its discretion in admitting the "other acts" evidence and Kelley's right to review the sentences imposed was waived, we affirm.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to Rule 809.21, Stats.

Marilyn L. Graves
Clerk of Court of Appeals
(stamp)